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No. 91-

Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

VICTOR STEPHENS,
Petitioner,
—against—
THE STATE OF ALABAMA,
Respondent.

On Writ of Certiorari To The Supreme Court of Alabama

PETITION FOR A WRIT OF CERTIORARI AND APPENDICES A–C

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July 8, 1991

Questions Presented

1. Should certiorari be granted where the Alabama Supreme Court has upheld the imposition of the death penalty by a trial judge, where neither the trial judge, the Alabama Supreme Court, nor the Alabama Legislature has prescribed a standard for the making of such decision in the face (as here) of a jury recommendation of a life sentence, especially where there are conflicting decisions of the Florida and Indiana Supreme Courts, effectively holding that the *Tedder* standard approved by this Court is required under the U.S. Constitution, and that a sentence of death following a jury recommendation of life can be sustained only if the facts suggesting the sentence of death are so clear and convincing that virtually no reasonable person could differ?

2. Should certiorari be granted, petitioner's conviction vacated, and the case remanded to the Alabama Supreme Court for reconsideration in light of this Court's recent decision in *Cage v. Louisiana* because the trial court charged the jury that to acquit petitioner it must have an actual and substantial doubt as to his guilt and to find him guilty it must be morally certain of his guilt?

3. Should certiorari be granted, petitioner's murder conviction vacated, and the case remanded to the Alabama Supreme Court for further consideration based on this Court's recent decision in *Schad v. Arizona* because the trial court failed to charge the jury on the lessor included offense of

felony–murder (a non–capital offense in Alabama) in violation of petitioner's Fourteenth Amendment rights?

4. Should certiorari be granted because the prosecution's use of 21 out of 23 of its peremptory challenges to exclude black jurors constituted a violation of the principle established by this Court in *Batson v. Kentucky*?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES vii

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED . . 2

STATEMENT OF THE CASE 4

PROCEDURAL HISTORY 4

FACTS 4

REASONS FOR GRANTING THE WRIT 5

I. Certiorari should be granted because there is a conflict between holdings of the Florida and Indiana Supreme Courts on the one hand and the Alabama Supreme Court on the other as to whether a judge may constitutionally override a jury verdict recommending a sentence of life imprisonment in situations where neither the *Tedder* standard requiring that the facts suggesting a sentence of death be so clear and convincing that no reasonable person could differ nor any other standard is applied. 6

II. Certiorari should be granted, petitioner's conviction should be vacated, and the case should be remanded to the Alabama Supreme Court for reconsideration in light

Page

of this court's recent decision in *Cage v. Louisiana* because the trial court charged the jury that to acquit petitioner it must have an actual and substantial doubt as to his guilt and to find him guilty it must be morally certain of his guilt. 11

III. Certiorari should be granted, Petitioner's conviction should be vacated, and the case should be remanded to the Alabama Supreme Court for further consideration based on this Court's recent decision in *Schad v. Arizona* because the trial court failed to charge the jury on felony murder (a non-capital offense) in violation of petitioner's Fourteenth Amendment rights. . 14

IV. Certiorari should be granted because the prosecutor's use of 21 out of 23 peremptory challenges against black jurors violated the principle of law set out by this Court in *Batson v. Kentucky* 17

CONCLUSION 19

APPENDIX A
Opinion of the Alabama Supreme Court . . . A–1

APPENDIX B
Opinion of the Alabama Court of Criminal Appeals B–1

TABLE OF CONTENTS (Continued)

Page

APPENDIX C
Sentencing Order of the Circuit Court of Hale County, Alabama C–1

APPENDIX D
Excerpts from the Trial Record D–1

Circuit Court of Hale County, Alabama
Direct Examination of Charles S. Stone by Prosecution D–1

Circuit Court of Hale County, Alabama
Direct Examination of Charles S. Stone by Prosecution D–16

Circuit Court of Hale County, Alabama
Direct Examination of William E. Traylor by Prosecution D–35

Circuit Court of Hale County, Alabama
Defense Counsel's Opening Remarks . . . D–56

Supreme Court of Alabama
Petition for Writ of Certiorari and Brief of Appellant D–62

Supreme Court of Alabama
Application for Rehearing D–86

Circuit Court of Hale County, Alabama
Closing Argument of Defense Counsel . . D–105

Circuit Court of Hale County, Alabama
Judge's Instruction to Jury D–112

Page

Circuit Court of Hale County, Alabama
Discussion of Jury Charge Outside the
Presence and Hearing of the Jury . . . D–131

Circuit Court of Hale County, Alabama
Proceedings Outside the Presence and
Hearing of the Venire D–143

APPENDIX E
Relevant Statutes from Section 13A of the
Alabama Criminal Code E–1

TABLE OF AUTHORITIES

Federal Cases	Page
Batson v. Kentucky, 476 U.S. 79 (1986)	6, 17
Beck v. Alabama, 447 U.S. 625 (1980)	15
Cage v. Louisiana, 59 U.S.L.W. 3361 (Nov. 13, 1990) (per curiam)	6, 11, 12
Chapman v. California, 386 U.S. 18 (1967)	10, 11
Dobbert v. Florida, 432 U.S. 282 (1977)	8
Gregg v. Georgia, 428 U.S. 153 (1976)	9
Hernandez v. New York, 59 U.S.L.W. 4501 (May 28, 1991)	17
Hopper v. Evans, 456 U.S. 605 (1982)	15
Johnson v. Louisiana, 406 U.S. 356 (1972)	13
Lee v. Illinois, 476 U.S. 530 (1986)	10
Michigan v. Long, 463 U.S. 1032 (1983)	7
Proffitt v. Florida, 428 U.S. 242 (1976)	9
Schad v. Arizona, 59 U.S.L.W. 4762 (June 21, 1991)	6, 15
Schiro v. Indiana, 475 U.S. 1036 (1986)	8

Spaziano v. Florida, 468 U.S. 447 (1984) 7, 8

State Cases

Crowe v. State, 485 So.2d 351 (Ala. Ct. Crim. App. 1985) *cert. denied* 477 U.S. 909 (1986) 10

Ex Parte Hays, 518 So.2d 768 (Ala. 1986) *cert. denied* 108 S. Ct. 1099 (1988) 9, 10

Ex Parte Pruitt, 457 So.2d 456 (Ala. 1984) (per curiam) 15

Freeman v. State, 555 So.2d 215 (Ala. 1989) *cert. denied* 110 S. Ct. 2604 (1990) 10

Hadley v. State, 575 So.2d 145 (Ala. Ct. Crim. App. 1990) 9

Harrell v. State, 470 So.2d 1303 (Ala. Ct. Crim. App. 1984) *cert. denied* 474 U.S. 935 (1985) 10

In re Tarver, 553 So.2d 633 (Ala. 1989) *cert. denied* 110 S. Ct. 1837 (1990) 9

Martinez Chavez v. Indiana, 539 N.E.2d 4 (Ind. 1989) 7

Russaw v. State, 572 So.2d 1288 (Ala. Ct. Crim. App. 1990) 14

Tedder v. State, 322 So.2d 908 (Fla. 1975) 7

Statutes

Ala. Code § 13A–6–2; 13A–5–40(b)..... 14

No. 91

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

VICTOR STEPHENS,

Petitioner,

-against-

THE STATE OF ALABAMA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Petitioner respectfully requests that a writ of certiorari be issued to review a decision of the Supreme Court of Alabama, entered on March 15, 1991, which affirmed both petitioner's convictions for robbery and murder, and his death sentence on the murder counts, and to review a subsequent decision of the Supreme Court of Alabama, entered on April 11, 1991, which denied reconsideration of its first decision. Petitioner respectfully submits that the issuance of a writ of certiorari is

provident both because the Alabama courts here decided important questions of federal law which should be decided by this Court, and because they have decided federal questions in a way which conflicts with applicable decisions of this Court and other courts. *See* Supreme Court Rule 10(1)(b) and (c).

Opinions Below

The opinions of the Alabama Supreme Court, as well as the opinions of the Alabama Court of Criminal Appeals and the Hale County, Alabama Circuit Court, are reprinted respectively in Appendices A, B and C to this petition.

Jurisdiction

This court has jurisdiction to review the decision of the Alabama Supreme Court pursuant to 28 U.S.C. § 1257(a).

Constitutional Provisions Involved

This case involves the Fifth Amendment to the United States Constitution which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation;

the Sixth Amendment to the United States Constitution which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense;

the Eighth Amendment to the Constitution which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

and the Fourteenth Amendment to the United States Constitution which provides in relevant part:

> Section 1 – All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Procedural History

On December 17, 1987, petitioner, Victor R. Stephens, was convicted in the Hale County, Alabama, Circuit Court of two counts of robbery and murder. R.165. As required by Alabama law, a sentencing hearing was held on the capital convictions, and, after due deliberation, the jury recommended a sentence of life imprisonment without parole. On July 24, 1989, the trial court overrode the jury's recommendation, and sentenced petitioner to death. In overriding the jury verdict, the trial court did not (and under the Alabama Supreme Court's interpretation of the Federal Constitution was not required to) apply a standard requiring that the facts suggesting a sentence of death be so clear and convincing that no reasonable person could differ.

Petitioner appealed both his conviction and his sentence to the Alabama Court of Criminal Appeals and then to the Alabama Supreme Court, asserting, *inter alia*, that numerous constitutional violations occurred both during his trial and at his sentencing. Both courts affirmed his conviction and death sentence. Following the denial of a motion for reconsideration by the Alabama Supreme Court, Victor Stephens now files the present petition for certiorari.

Facts

On January 20, 1986, a robbery occurred at Bailey's Grocery Store in Hale County, Alabama. During this robbery, the owner of the store, James R. Bailey, and another man, Adam Pickens, were shot and killed.

Later that evening, petitioner sought treatment for a shotgun wound to his left hand at the Bowden Area Hospital in Carroll County, Georgia. Petitioner was subsequently arrested at the hospital, and extradited to Alabama to stand trial for the crimes of which he was later convicted. Record [hereinafter R.] at 39; R.670 reproduced in Appendix [hereinafter App.] D at 52.

At trial, there was evidence putting petitioner and another man, Christopher L. (Peabody) Starks at the crime scene. R.30, App. D at 6; R.37, App. D at 13–14; R.619, App. D at 25–26.[1] However, there was a substantial dispute as to the role played by each. The state took the position that petitioner was intimately involved in all aspects of the crime. R.82–83; R.422–23. Victor Stephens took the position that Starks went into the store to rob it, while he, Stephens, waited outside; that after some time had gone by, he entered the store to see what had happened, not intending to kill anyone, only to walk head on into some shotgun blasts fired by Mr. Bailey; and that he then fired back, essentially in self–defense. R.30, App. D at 6–7; R.37, App. D at 13–14; R.626, App. D at 33; R.670, App. D at 52.[2]

Reasons for Granting The Writ

Certiorari should be granted in the present case for four reasons. First, there is a split between the Supreme Court of Alabama on the one hand, and the Supreme Courts of Florida and Indiana on the other, as to what standard, if any, is

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1. Starks was also convicted of murder, but was sentenced to prison, not death. Trial documents at 178, App. D at 55.

2. The trial court overruled the jury verdict of a life sentence despite this evidence, and despite the fact that Starks was not sentenced to death.

constitutionally required to be applied by a court in overruling a jury verdict of life imprisonment in favor of a death sentence. Of all the states which permit capital punishment, only Alabama, Florida and Indiana permit a judicial imposition of a death sentence after a jury has found a sentence of life imprisonment to be appropriate.[3] However, the Supreme Courts of Florida and Indiana have found that the Federal Constitution precludes a judge from doing so unless the facts suggesting a sentence of death are so clear and convincing that no reasonable person could differ. The Supreme Court of Alabama has decided, to the contrary, that no particular standard is required to be used in overriding a jury's verdict in favor of life imprisonment.

Additionally, certiorari should be granted, petitioner's convictions vacated, and the case remanded to the Supreme Court of Alabama for further consideration in light of this court's recent decisions in *Cage v. Louisiana* and *Schad v. Arizona*. Finally, certiorari should be granted because a violation of *Batson v. Kentucky* took place at petitioner's trial.

I. CERTIORARI SHOULD BE GRANTED BECAUSE THERE IS A CONFLICT BETWEEN HOLDINGS OF THE FLORIDA AND INDIANA SUPREME COURTS ON THE ONE HAND AND THE ALABAMA SUPREME COURT ON THE OTHER AS TO WHETHER A JUDGE MAY CONSTITUTIONALLY OVERRIDE A JURY VERDICT RECOMMENDING A SENTENCE OF LIFE IMPRISONMENT IN SITUATIONS WHERE NEITHER THE *TEDDER* STANDARD REQUIRING THAT THE FACTS

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3. Four other states allow a judge to sentence a defendant to life imprisonment after a jury has recommended a death sentence.

SUGGESTING A SENTENCE OF DEATH BE SO CLEAR AND CONVINCING THAT NO REASONABLE PERSON COULD DIFFER NOR ANY OTHER STANDARD IS APPLIED.

Of all the states which permit capital punishment, only three, Alabama, Indiana, and Florida, allow judicial override of jury recommendations of life sentences in favor of the death penalty. *See Spaziano v. Florida*, 468 U.S. 447, 463 & n.9 (1984). Both the Indiana and Florida Supreme Courts have limited judicial discretion to do the same, however, by adopting, after finding that the Federal Constitution requires it, what is known as the *Tedder* standard,[4] pursuant to which the judge may not override unless the facts suggesting a sentence of death are so clear and convincing that no reasonable person could differ. *Martinez Chavez v. Indiana*, 539 N.E.2d 4, 5 (Ind. 1989); *Tedder v. State*, 322 So.2d 908 (Fla. 1975).[5]

Moreover, this Court, in upholding Florida's capital punishment scheme against Sixth, Eighth and Fourteenth Amendment challenges,[6] has repeatedly relied on the fact that Florida has adopted the *Tedder* standard. For example, in

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4. *Tedder v. State*, 322 So.2d 908 (Fla. 1975).

5. Although these courts did not specifically state that they were basing their holdings on Federal Constitutional law, neither did they indicate that they were basing their holdings on state law. As such, this Court's decision in *Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983), requires that the decisions be treated as resting on federal law.

6. Florida's capital punishment scheme is the only capital punishment scheme where judicial override of jury recommendations of life sentences are permitted to have been upheld by this Court as not violative of the Constitution.

Spaziano v. Florida, 468 U.S. 447 (1984), this Court rejected a challenge to the Florida standard for allowing a trial court to override a jury's recommendation of life, noting that "[t]his court already has recognized the significant safeguard the *Tedder* standard affords a capital defendant in Florida ... [and] [w]e are satisfied the Florida Supreme Court takes that standard seriously and has not hesitated to reverse a trial court if it derogates the jury's role." *Id.* at 465 (citations omitted).[7]

Similarly, in *Dobbert v. Florida*, 432 U.S. 282 (1977), this Court noted:

> Perhaps most importantly, the Florida Supreme Court has held that the following standard must be used to review a trial court's rejection of a jury's recommendation of life:
>
> "In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." *Tedder v. State*, 322 So.2d 908, 910 (1975) (emphasis added) (cited with approbation in *Proffitt v. Florida*, 428 U.S. at 249).
>
> This crucial protection demonstrates that the new statute affords significantly more safeguards to the defendant than did the old. Death is not automatic,

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7. Two Justices of this Court have gone so far as to indicate that this Court *held* in *Spaziano* that a *Tedder* type standard is required. *See Schiro v. Indiana*, 475 U.S. 1036, 1038–39 (1986) (Brennan J. and Marshall J. dissenting from the denial of petition for certiorari) (this Court in its *Spaziano* decision upholding the Florida provisions allowing judicial override of jury verdicts for life sentences explicitly relied on the fact that Florida had adopted the *Tedder* standard).

> absent a jury recommendation of mercy, as it was under the old procedure. A jury recommendation of life may be overridden by the trial judge only under the exacting standards of *Tedder*.

Id. at 295–96. *See also Proffitt v. Florida*, 428 U.S. 242, 249–50 (1976) (plurality opinion) (to the same effect).

The Alabama Supreme Court, by contrast, has found in both the present and other cases that the Federal Constitution and Alabama law permit judicial overrides of jury verdicts recommending life sentences in situations where the facts suggesting a sentence of death are not so clear and convincing that no reasonable person could differ.[8] *Ex Parte Hays*, 518 So.2d 768, 775–76 (Ala. 1986) *cert. denied* 108 S. Ct. 1099 (1988); *Hadley v. State*, 575 So.2d 145, 159 (Ala. Ct. Crim. App. 1990). Thus, the Alabama Supreme Court's holdings *vis a vis* the Federal Constitution are in direct contravention of numerous opinions of the Florida Supreme Court, the Indiana Supreme Court, and quite arguably of this Court.[9]

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8. Not only has Alabama failed to adopt a *Tedder* type standard, but it has not adopted any specific standard to be used in judging the deference to be accorded a jury verdict recommending a life sentence, and the propriety of a court's override of a jury verdict in favor of the same. *See e.g. In re Tarver*, 553 So.2d 633, 634–35 & n.1 (Ala. 1989) (Maddox J. concurring) *cert. denied* 110 S. Ct. 1837 (1990). It is respectfully submitted that this failure of the Alabama Courts to provide any standard to be used in determining the deference to be accorded the jury's recommendation of a life sentence makes the Alabama death penalty scheme arbitrary and capricious in violation of *Gregg v. Georgia*, 428 U.S. 153, 188–89 (1976).

9. Alabama is, as a result, the only State in which a court may, without applying any standards, override a jury's decision recommending a life sentence, and instead impose a sentence of death. It is respectfully submitted that this violates the spirit of the Sixth Amendment's guarantee to criminal defendants of

The split between Supreme Court of Alabama holdings that do not require the *Tedder* standard to be applied in judicial overrides, and those of the Florida and Indiana Supreme Court, as well as this Court, indicating that such a standard is constitutionally required, has resulted in great uncertainty as to what the Sixth, Eighth and Fourteenth Amendments require. It also appears to have resulted in numerous petitions for certiorari being filed with this Court over the years. *See Freeman v. State*, 555 So.2d 215 (Ala. 1989) *cert. denied* 110 S. Ct. 2604 (1990); *Ex Parte Hays*, 518 So.2d 768, 775–76 (Ala. 1986) *cert. denied* 108 S. Ct. 1099 (1988); *Harrell v. State*, 470 So.2d 1303, 1309 (Ala. Ct. Crim. App. 1984) *cert. denied* 474 U.S. 935 (1985); *Crowe v. State*, 485 So.2d 351, 364 (Ala. Ct. Crim. App. 1985) *cert. denied* 477 U.S. 909 (1986).

It is respectfully submitted that the granting of certiorari in the present case presents an excellent opportunity for this Court to end the confusion surrounding this issue, and finally resolve the dispute as to whether a *Tedder* type standard is required by the Constitution in judicial override cases.[10]

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a right to have their fate decided by a jury of their peers. It is hard to believe that when Alexander Hamilton wrote in Federalist No. 83 (Modern Library Ed. at 543) that trial by jury in criminal cases was a protection against the judicial despotism imposed, *inter alia*, by arbitrary punishment, that he conceived of a system wherein a judge could set aside a jury's decision that an offense should not entail capital punishment.

10. Victor Stephens' counsel raised this issue both at trial and on his appeal to the Alabama appellate courts, thus making it appropriate for this court to consider the issue. R.909–10, App. D at 57–59; App. D at 70, 85; App. D at 90–92. Nor can such error be considered harmless, *Chapman v. California*, 386 U.S. 18 (1967), since it is respectfully submitted that the facts in this case suggesting a sentence of death are not so clear and convincing that no reasonable person could differ. And at all events, should the issue arise, the Alabama Supreme Court should, on remand, have the opportunity to make such a harmless error determination in the first instance. *See Lee v. Illinois*,

II. CERTIORARI SHOULD BE GRANTED, PETITIONER'S CONVICTION SHOULD BE VACATED, AND THE CASE SHOULD BE REMANDED TO THE ALABAMA SUPREME COURT FOR RECONSIDERATION IN LIGHT OF THIS COURT'S RECENT DECISION IN *CAGE V. LOUISIANA* BECAUSE THE TRIAL COURT CHARGED THE JURY THAT TO ACQUIT PETITIONER IT MUST HAVE AN ACTUAL AND SUBSTANTIAL DOUBT AS TO HIS GUILT AND TO FIND HIM GUILTY IT MUST BE MORALLY CERTAIN OF HIS GUILT.

At petitioner's trial, the trial court violated his Due Process rights by using evidentiary presumptions in the jury charge that had the effect of relieving the state of its burden of proof beyond a reasonable doubt as to each essential element of the crimes of which he was convicted.[11]

This term this Court decided a case almost exactly on point. *Cage v. Louisiana*, 59 U.S.L.W. 3361 (Nov. 13, 1990) (per curiam). In *Cage*, this Court summarily reversed a conviction where the trial court had improperly instructed the jury on

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476 U.S. 530, 547 (1986).

11. Again, counsel for Victor Stephens raised this issue both at trial and before the Alabama appellate courts, thus making it appropriate for this court to consider it. R.807–08, App. D at 95–97; *see* App. D at 110. Also, it is once again suggested that the facts in this case were such, particularly since they came down to a determination over the respective roles of Victor Stephens and Christopher Starks, that such error was not harmless. *Chapman v. California*, 386 U.S. 18 (1967).

the element of reasonable doubt. The instruction under review in *Cage* provided:

> If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrated a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. It must be such doubt as would give rise to a grave uncertainty, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not mere possible doubt. It is an actual substantial doubt. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a moral certainty.

Cage, 59 U.S.L.W. at 3361.

This Court concluded that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by Due Process. It wrote:

> It is plain to us that the words "substantial" and "grave," as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard. When those statements are then considered with the reference to "moral certainty," rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.

Id.

At Victor Stephens' trial, the trial court used almost exactly the words that *Cage* held are commonly understood to denote a higher degree of doubt. The trial court stated that "the doubt which would justify an acquittal must be *an actual and substantial doubt.*" R.832, App. D at 117–18 (emphasis added). The court told the jury that it need only have *"an abiding conviction of the truth of the charge."* R.832, App. D at 118 (emphasis added). In addition, the court, at several points, equated beyond a reasonable doubt with *"to a moral certainty."* R.833, App. D at 118 (emphasis added).

As a result of these erroneous jury instructions, the jury could have found Victor Stephens guilty without "reaching a subjective state of certitude", *Johnson v. Louisiana*, 406 U.S. 356, 360 (1972), and therefore could have found him guilty on a degree of proof below that required by Due Process.

Because of the similarity between *Cage* and the present case, it is respectfully submitted that certiorari should be granted, Victor Stephens conviction vacated, and the case remanded to the Alabama Supreme Court for reconsideration in light of *Cage*.[12]

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12. Alternatively, this Court could consider granting certiorari and summarily reversing petitioner's conviction as it did in *Cage*.

III. CERTIORARI SHOULD BE GRANTED, PETITIONER'S CONVICTION SHOULD BE VACATED, AND THE CASE SHOULD BE REMANDED TO THE ALABAMA SUPREME COURT FOR FURTHER CONSIDERATION BASED ON THIS COURT'S RECENT DECISION IN *SCHAD V. ARIZONA* BECAUSE THE TRIAL COURT FAILED TO CHARGE THE JURY ON FELONY MURDER (A NON-CAPITAL OFFENSE) IN VIOLATION OF PETITIONER'S FOURTEENTH AMENDMENT RIGHTS.

At petitioner's trial, the trial court violated his Due Process rights by failing to give a jury charge for the lesser included offense of felony murder,[13] thus creating the possibility that the jury may have believed him only guilty of felony murder, but voted for a capital conviction rather than allow petitioner to be punished only for a robbery or manslaughter conviction.[14]

Earlier this term this Court reaffirmed that, in capital cases, the jury must be given the opportunity to convict a defendant of a lesser included offense in any case in which "the evidence warrants such an instruction", and that failure to give

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13. At Alabama law, a felony murder is not a *capital* murder for which the death penalty may be imposed, *Russaw v. State*, 572 So.2d 1288, 1292 (Ala. Ct. Crim. App. 1990), Ala. Code § 13A-6-2; 13A-5-40(b), App. E at 2-5, and therefore, is a lesser included offense of capital murder.

14. Counsel for Petitioner raised this issue in the lower court, R.781-82, App. D at 137-138, as well as before the Alabama Supreme Court. App. D at 92-95.

the jury such an opportunity violates the capital defendant's Fourteenth Amendment Due Process rights. *Schad v. Arizona*, 59 U.S.L.W. 4762 (June 21, 1991). *See also Hopper v. Evans*, 456 U.S. 605, 610 (1982) (same); *Beck v. Alabama*, 447 U.S. 625, 627 (1980) (same). A lesser included instruction is required whenever "the evidence would permit a jury rationally to find a defendant guilty of the lesser offense and and acquit him of the greater." *Hopper v. Evans*, 456 U.S. at 612 (citation omitted).

This occurred in the present case because, while the State introduced overwhelming evidence of a robbery, and evidence connecting petitioner to that robbery, there was also substantial evidence that the killings were the *unintended* consequence of one of the victims drawing and firing a shotgun.[15] This evidence included three statements of the defendant which the state presented to the jury. In the first statement, given on January 23, 1986, Mr. Stephens stated that it was Stark's idea to rob the store, that he did not know who had shot first, Starks or the store–owner, but that when he entered the store "he was shot by one of the men in the store with a shotgun." R.619, App. D at 25. He also related that he was high on cocaine and LSD prior to the robbery and therefore could not remember all of the details. R.619, App. D at 25. In the second statement, which was given on January 25, 1986, and read to the jury, Mr. Stephens stated:

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15. An accused is entitled to a lesser included instruction regardless of whether the State or the defendant offers the evidence supporting the lesser included offense. *Hopper v. Evans* 456 U.S. at 611–12; *Ex Parte Pruitt*, 457 So.2d 456, 457 (Ala. 1984) (per curiam). In addition, if "the defendant denies the charge but the evidence presented by the State suggests a reasonable theory supporting a charge on a lesser offense, the trial court is obliged to give a charge on the lesser offense when requested." *Ex Parte Pruitt* at 457.

> I just walked into the store after Peabody [Starks] went in. He had been in a while so I went in to see what was happening. When I walked in, the white man started shooting with a shotgun. I just pulled out my pistol and started shooting. We left and came back to Georgia.

R.626–27, App. D at 33. And in the third statement, given on January 28, 1986, and also read to the jury, Mr. Stephens explained:

> After we came across a long bridge in Alabama, Peabody kept saying, 'he needed some money.' After we crossed the bridge, we pulled over to this store to get gas. Peabody said 'he needed some money.' I told him I had enough money to get us home.
>
> When we pulled up to the gas pump a white man came out and pumped us $10 worth of gas. I asked the man if he had a bathroom and he said 'no.' I got back in the truck and smoked a cigarette. Peabody went into the store. He stayed [in] the store a long time and I walked up to the store and opened the door, then this white man shot me in the hand. I fell to my knees and pulled my gun (.25 cal. automatic) out of my right rear pocket and started shooting. I don't even know if I shot anybody or not. The white man was standing to my left when he shot me with the shotgun. Peabody came running by me yelling 'let's go, let's go.' We ran out and jumped in the truck. I didn't make it in time.

R.669–70, App. D at 52.

This evidence clearly supported a theory of felony–murder. In fact, the evidence of an unintentional killing was so strong that the court actually instructed the jury on the affirmative defense of self–defense. R.829–30, App. D at

115–116. However, the court decided not to instruct on felony–murder because the State convinced the court that there is no difference between intentional murder during a robbery and felony–murder. R.782, App. D at 138 ("[t]hey don't have to come in with intent to kill them and rob them"). Of course there was a crucial difference, since felony murder is not a capital offense.

Because of the recent reaffirmance of the *Hopper* and *Beck* holdings in *Schad*, it is respectfully submitted that certiorari should be granted, Victor Stephens conviction vacated and the case remanded for further consideration in light of *Schad*.[16]

IV. CERTIORARI SHOULD BE GRANTED BECAUSE THE PROSECUTOR'S USE OF 21 OUT OF 23 PEREMPTORY CHALLENGES AGAINST BLACK JURORS VIOLATED THE PRINCIPLE OF LAW SET OUT BY THIS COURT IN *BATSON V. KENTUCKY*.

In *Batson v. Kentucky*, 476 U.S. 79 (1986), this Court held that a prosecutor could not use peremptory challenges to exclude members of minority groups from a jury. The burden of establishing racial bias is initially on the party alleging discriminatory use of the peremptory challenges, who must establish a *prima facie* case. *Id.* at 93. The burden then switches to the state, which must articulate a clear, specific, nondiscriminatory reason for peremptorily challenging each minority juror. The trial court has broad discretion in accepting or rejecting these reasons. *Hernandez v. New York*, 59 U.S.L.W. 4501, 4505 (May 28, 1991).

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16. Alternatively, this Court could consider granting certiorari and summarily reversing petitioner's conviction.

In the present case, the trial court, after counsel for petitioner raised the issue, App. B at 6–7; App. D at 144, found a *prima facie Batson* violation had been made out, but accepted the prosecution's explanations for its peremptory challenges of black jurors.[17] However, review of the reasons the prosecution gave for challenging some of the jurors makes clear that the trial court abused its discretion by accepting them.

For example, the state asserted that it was excluding three black jurors, Ms. E. Williams, Ms. A. Harms, and Ms. Hayes because they knew too much about the case, while it excluded black juror Ms. Shelton for knowing too little about the case. Additionally, the prosecution did not peremptorily challenge Mr. Corley, a white juror who stated that he knew *nothing* about the case. App B at 152. *See* R.159.

The State's exclusion of three black jurors for knowing too much about the case, while another black juror was excluded for knowing too little, particularly when a white juror who knew nothing about the case was not challenged, makes clear that the trial court's acceptance of the State's *Batson* reasons was an abuse of discretion.

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17. Petitioner also raised this issue before the Alabama Supreme Court. App. D at 65–68; App. D at 89–90.

Conclusion

For the various reasons given, Victor Stephens' petition for certiorari should be granted.

Respectfully submitted,

July 8, 1991

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APPENDIX A

SUPREME COURT OF ALABAMA

October Term, 1990–91

1900032

Ex parte Victor R. Stephens

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(Re: Victor R. Stephens

v.

State)

(Hale Circuit Court, CC–89–34)

PER CURIAM.

Pursuant to Rule 39(c), Ala. R. App. P., we granted the defendant's petition to review the judgment of the Court of Criminal Appeals affirming his conviction and sentence of death. *Stephens v. State*, [Ms. 2 Div. 738, Aug. 3, 1990] __ So. 2d __ (Ala. Crim. App. 1990). After considering the record of trial, the Court of Criminal Appeals' opinion, and the briefs and arguments of the parties, we find no basis for reversal of the judgment of the Court of Criminal Appeals.

AFFIRMED.

Hornsby, C.J., and Maddox, Almon, Shores, Adams, Houston, Steagall, Kennedy, and Ingram, JJ., concur.

APPENDIX B

THE STATE OF ALABAMA — JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1989–90

2 Div. 738

Victor R. Stephens

v.

State
Appeal from Hale Circuit Court
(CC–86–34)

TAYLOR, PRESIDING JUDGE

The appellant, Victor R. Stephens, was convicted of both counts of an indictment charging him with a capital offense involving the robbery and murder of James R. Bailey, in violation of § 13A–5–40(a)(2), *Code of Alabama* 1975, and a capital offense involving the robbery and murder of Adam Pickens, also in violation of § 13A–5–40(a)(2). Following a sentence

hearing, the jury recommended a sentence of life imprisonment without possibility of parole. The trial court, after complying with §13A–5–47, *Code of Alabama* 1975, sentenced the appellant to death by electrocution.

The bodies of James R. Bailey and Adam "Pop" Pickens were discovered at Bailey's Grocery Store on Alabama Highway 14 in the Wedgeworth community near Sawyerville, in Hale County, Alabama, on January 20, 1986. Mr. Bailey, age 72, the owner of the store, was found dead inside the store — apparently of multiple gunshot wounds. Adam Pickens, age 83, was still alive, but also suffering from multiple gunshot wounds. Mr. Pickens was taken to Druid City Hospital in Tuscaloosa, Alabama, where doctors attempted to save his life. However, Mr. Pickens died while in surgery.

The evidence as presented by the State tended to establish that Mr. Bailey and Mr. Pickens were last seen alive by Mr. Bailey's daughter–in–law Sandra Bailey. Ms. Bailey "ran down" to her father–in–law's store between 4:25 and 4:30 p.m. on January 20 to purchase a gallon of milk before the store closed for the day. Sylvester Jackson came to the store between 4:30 and 5:00 p.m. to buy some gasoline for his car. After pumping the gas, Mr. Jackson entered the store to pay for the gas. He observed both victims lying on the floor. Mr. Jackson ran out of the store and rushed home to tell his mother what he had seen. His mother called the sheriff's department and told them what her son had seen.

Shortly thereafter, Hale County Sheriff H.C. Colvin, Alabama Bureau of Investigation investigator C.W. Gibson, and Alabama Department of Forensic Sciences crime scene examiner John McDuffie arrived at the store to begin their

investigation and to collect any evidence which might assist them in discovering the identity of the person or persons who shot the two men. The examination of the store revealed that Mr. Bailey was robbed of money and food stamps and that Mr. Bailey had fired his .20 gauge shotgun at the robbers. Adam Pickens was unarmed. Mr. Bailey was found in the middle of the store still clutching his shotgun. Mr. Bailey had apparently been shot in a different location inside the store as there was a trail of blood leading to Bailey's body. Further examination of the scene revealed that one individual—later determined to be the appellant—had been hit by the shotgun blast as blood was found near the front door together with a .25 caliber automatic pistol. A number 8 shotgun pellet was removed from the barrel of the weapon.

Further investigation revealed that Carrie Ingram and Sheila Kennedy were walking along Alabama Highway 60 in Akron late on the afternoon of January 20, 1986. The two women were walking in the oncoming traffic lane--approximately 6 miles from Bailey's store— when they were met by a small black pickup truck traveling at a high rate of speed. The truck was proceeding in a direction away from Bailey's store. The women noticed that the passenger in the truck was black and that he appeared to be slumped over in the seat. Linda Johnson and her son Kevin also saw the black pickup on Highway 60 that afternoon. According to Ms. Johnson, she was preparing to turn left from Highway 60 onto County Road 45 when she looked into her rear–view mirror and noticed a black pickup truck coming up behind her at a high rate of speed. Despite the fact that Ms. Johnson had turned on the vehicle's left–turn signal, the truck showed no sign of reducing its rate of speed. Fearing a collision, Ms. Johnson stopped her vehicle and allowed the truck to overtake her before she completed her left turn. Although she could not identify the make of the truck or who was driving it, her son Kevin readily

identified it as a black Nissan pickup truck and told authorities that he had observed two black males inside the truck.

Pursuant to the information received from various witnesses and the evidence collected at the scene, the Hale County Sheriff's Department issued a regional teletype advising law enforcement agencies to "be on the lookout" for two males, armed, one possibly injured. The teletype also requested that these agencies check area clinics and hospitals for persons with possible gunshot wounds. On Tuesday, January 21, 1986, Georgia Bureau of Investigation agent Charles Stone and ABI agent Ed Traylor advised the Hale County Sheriff's Department that both subjects were in custody in Carroll County, Georgia. Further information from Georgia officials revealed that Christopher L. Starks was apprehended in possession of a .32 caliber pistol and that the appellant, Victor R. Stephens, was treated for a shotgun wound to his left hand at the Bowdon Area Hospital in Carroll County, Georgia, on Monday evening January 20, 1986.

On Wednesday, January 22, 1986, a black Nissan pickup truck owned by Christopher L. Starks, a co–defendant, was searched by law enforcement agencies. Found in the vehicle were blood stains on the passenger's seat and three (3) one–dollar denomination "food stamps" which had been issued from food stamp offices in Hale County and Tuscaloosa County, Alabama. Also taken from the glove compartment of the truck were identification papers belonging to the appellant, Victor R. Stephens.

A series of statements were taken by law enforcement officials from the appellant while he was in the custody of Georgia officials. These statements were taken orally on

January 23, 25, and 28, 1986. The gist of the three statements revealed that appellant and Christopher "Peabody" Starks, left Georgia on Saturday, January 18, 1986, and traveled to New Orleans, Louisiana, where they remained until Monday, January 20, 1986. On Monday, while Stark was driving through Alabama on the way back to Georgia, the two men decided they needed some money. According to the appellant, Starks suggested that they find someplace to rob. They went into a store in Alabama occupied by an elderly white man— subsequently identified as James R. Bailey — and an elderly black man — subsequently identified as Adam Pickens. "Peabody" entered the store and displayed his weapon, while the appellant guarded the entrance. After the appellant and Starks obtained the contents of the store's cash register, they started to leave. At this time, Mr. Bailey pulled out a shotgun and fired it. Pellets from the shotgun shell struck the appellant in the left hand. It was then that the appellant "emptied" his .25 caliber pistol. According to the appellant, Starks was armed with either a .22 or .32 caliber pistol. Appellant admitted leaving his .25 caliber automatic pistol at the store. The two men then got back into their truck and drove back to Georgia.

Autopsies were performed on both victims. The results revealed that James R. Bailey died as a result of multiple gunshot wounds to the face, chest, abdomen, and hand. Two expended .32 caliber bullets and one .25 caliber bullet were removed from Mr. Bailey's body. Adam's Picken's autopsy revealed that he died from four separate gunshot wounds to the back. All four expended bullets recovered from Pickens's body were .25 caliber bullets. The seven expended bullets removed from the victims (three from Bailey, four from Pickens) were sent to the Alabama Department of Forensic Sciences for examination. Forensic firearm examiner Lawden Yates examined each of the seven bullets. His examination revealed that the two .32 caliber bullets removed from Mr. Bailey's body

were fired from the same .32 caliber pistol found on the person of Christopher Starks at the time of his arrest. The five .25 caliber bullets removed from the victims (one from Mr. Bailey, four from Mr. Pickens) were fired by the .25 caliber automatic pistol that was left at the store by the appellant. Shotgun pellets removed from Stephens's hand at the Bowdon Area Hospital in Carroll County, Georgia, were compared with shotgun pellets removed from the store and the barrel of the .25 caliber gun. The analysis revealed all to be number 8 shotgun pellets, consistent with the type shell recovered from Bailey's weapon. This concluded the State's evidence.

The only evidence presented by the defense was in the form of testimony from Jessie Portis. Mr. Portis testified that he arrived at Bailey's store after Mr. Bailey and Mr. Pickens were shot. He leaned down and asked Mr. Pickens if he could say what color vehicle the robbers were in. According to Mr. Portis, Mr. Pickens responded that the robbers were in a red vehicle. When asked if the robbers were white or black, Mr. Pickens stated, "white."

I

Stephens, a black male, was tried by a jury composed of 7 white jurors and 5 black jurors following the prosecution's use of 21 of its 23 peremptory challenges to eliminate black potential jurors. Appellant's defense counsel timely objected to the composition of his client's jury based on the State's alleged discriminatory use of its peremptory challenges, in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and *Ex parte Branch*, 526 So.2d 609 (Ala. 1987). Finding that the defense had established a prima facie case of racial discrimination, the trial court required the prosecution to

state the reasons for its strikes, and the following reasons were given:

1. *Mr. Mickens*— expressed serious reservations about imposing the death penalty.

2. *Ms. Ball*—expressed serious reservations about imposing the death penalty.

3. *Mr. Ball*—answered prosecutor's question concerning previous knowledge or association with illegal drugs, indicating that he, some member of his family, or a close friend had been involved with illegal drugs; his son had been in "some serious trouble" dealing with drugs and/or other criminal activity; also indicated he did not wish to serve on a jury.

4. *Mr. Patton*—affirmatively answered prosecutor's question concerning previous knowledge or association of any type of criminal offense; further investigation revealed that he had been convicted of night hunting and DUI.

5. *Ms. Hood*—asked to be excused from jury duty and "had quite a bit to say about lack of transportation and inability to get here and she was concerned and wouldn't be able to pay attention, etc."; husband was prosecuted and served time in jail for failure to pay court-ordered child support.

6. *Ms. Holifield*—prior arrests for writing "worthless checks and similar type offenses on several different occasions."

7. *Ms. C. Harris*—young, single, and unemployed; brother a defendant in a criminal prosecution.

8. *Ms. Spence*—sons had been involved in "some very serious criminal offenses."

9. *Ms. Johnson*—had been a defendant in small claims court and been served with numerous civil suits; appeared to be extremely responsive to the defendant's questions; also, the fact that she was chewing gum was felt to indicate her lack of respect for the seriousness of the proceedings.

10. *Ms. Cottrell*—asked to be excused from jury duty; also indicated in response to prosecutor's question that she, or someone very close to her, had been charged with some criminal offense.

11. *Mr. Pratcher*—although his permanent legal residence was in Hale County, he was currently living and working in Atlanta, Georgia; seemed to be interested in not serving on a jury; also was wearing sunglasses in the courtroom; also, at some time during voir dire proceedings, sat next to or appeared to have some sort of relationship with a juror excused for cause because of his views against capital punishment.

12. *Ms. Lewis*—single and unemployed; her son had been involved in some sort of "death or killing."

13. *Ms. Shelton*—prosecution found it "extremely strange" that every juror from her small community except her had heard something about the crime since it occurred in that community; also very insistent about giving her marital status as separated.

14. *Ms. E. Williams*—seemed to be very familiar with the facts of the case; indicated during voir dire that she was well aware that one of the victims had lived long enough to make a dying declaration.

15. *Ms. B. Wilson*—county sheriff was acquainted with juror and recommended that she be struck because she was "extremely anti-establishment" and because of belief that her husband had been involved in some type of criminal activity.

16. *Ms. A. Harris*—young, single, and unemployed; knew nothing of the facts surrounding the case.

17. *Mr. K. Williams*—general appearance was very rough and unkempt; also, like Juror Pratcher, appeared to be involved with a juror struck for cause because of his views against capital punishment.

18. *Ms. Brown*—husband a homicide victim; however, sheriff's department was

concerned about her as a juror because of her belief that her husband's case had been mishandled.

19. *Ms. Hayes*—seemed totally removed from the situation; felt that this might indicate animosity on her part, since she worked at the nursing home where the wife of one of the victims now lived.

20. *Ms. Hobson*—asked to be excused from jury duty; felt that this, along with fact that she had an invalid husband and a house damaged in the previous night's storm, might affect her concentration on the case.

21. *Ms. S. Harris*—relatives had been in trouble with the law.

The prosecutor's remaining two peremptory challenges were used to remove two white male jurors from the jury venire. The reasons given for these two jurors was that one "had been in criminal trouble and had been prosecuted at some point in time: and the other had a cousin that had been involved in some type of criminal activity. Defense counsel challenged the prosecutor's reasons for several of his strikes, alleging:

> "MR. MORRIS [defense counsel]: Judge, I'm not sure that I have any cross. I would make it known for the record on I think there were three people that they mentioned and that was Mr. Williams, Mr. Pratcher, and a Mr. Pratcher. Mr. Kenneth Williams and Mr. Willie Pratcher and one other individual that I believe the District Attorney alluded to as sitting

near or being around Mr. Gray. I would make it known to the Court, I believe the Court would recall that during yesterday's continuous voir dire that lasted into the night, Mr. Gray was an occupant on the front row with a Mr. Corley sitting on one side and a Mr. Collins sitting on the other. Both of whom were white. To my knowledge, there was not another black individual on the front row yesterday. So I would differ with the information of the State in that regard. Now the information that the District Attorney has concerning things like they had some relatives involved in some crimes, being in small claims court where they've been sued, matters like this, in light of the — the fact that the State said they didn't respond to any questions or didn't seem to know anything about it, we contend that the jurors by comparison that were left on this case knew nothing about it. Starting with Mr. Grinstead, Mrs. Fondren, Mr. Corley, also responded that they knew nothing about it. A Mrs. Lyles responded that she knew something about it. She was left. A black female. Now Mrs. Marks responded that she knew something about it, a black female. A Mr. Ryans responded that he knew something about it, a black male. A Mrs. Travis responded that the knew something about it, a black female. Mrs. Williams responded that she knew something about it, a black female, and our contention is that it's clear that the fact that someone knows nothing about it played on part and we contend that it was strictly on the basis of race in this matter.

"As to Mrs. Ruby Lee Brown, she stated in voir dire that her husband was a victim of a homicide

and that the victim was prosecuted and there would be no other — I believe she also responded — I believe she had a bumper sticker — I take that back, Your Honor. That's not true. I'm saying that there would be no reason in the world that I can think of why she would not be an excellent juror other than race. She was struck.

"Further, we contend that the last four strikes that they enumerated, starting with Mrs. Brown, are vague and very indecisive answers. For instance, Mrs. Hayes, number 19 strike, number 40 on the venire list, stated that she knew Mrs. Bailey and that she knew her and knew her daughter and had an association with Mrs. Bailey who's in the nursing home where she's employed as well as knew her daugher well. No conceivable reason that the defense can find, no conceivable reason that she would not make an excellent juror for the State, other than the fact that she's black.

"Now there's vague allegations on number 43, they say that her husband had been in some sort of problem. Mrs. Hobson, we contend that's just a smoke screen there. And then one of the persons up here, he had some sunglasses on. The defense contends certainly that is no justifiable reason. Now that's all I have."

The prosecutor responded as follows:

"MR. GREENE: Our only response is that one of the first things as to Mr. Gray, it was reported to us and made quite some concern as to Mr. Gray this morning concerning who he might talk to. Now this is the information we got from

the people we asked to try to pay attention. Now Mr. Williams, Gray, Patton and Pratcher, were sitting together this morning in the back of the courtroom. We felt that that might be a matter of concern. We point out for the record that the last, I think, five strikes for the State involved two white males we thought we had some problems with and three black females that we were concerned about. We also thought these three black females might make us good jurors, but we had reason, we felt, overrode our desires to retain them.

"I think that's all.

"THE COURT: Is it your testimony as an officer of this Court that the reasons for striking were non–racial and not based upon the race of any particular juror?

"MR. GREENE: It is, Your Honor. I think the jurors we have before us bears that out. There's black males serving, some five blacks in total. We have an abundance of females on this jury in a capital murder case. I think we've got a jury that well reflects, based upon peoples backgrounds, Your Honor, and on that basis, a fair racial mixture of males and females, black and white, in this community. We arrived at this through exhaustive and argumentative process."

Thereafter, the trial court found that appellant's *Batson* motion was not well–taken, and overruled the motion.

In reviewing this issue, we find particularly helpful this Court's recent decision *Warner v. State*, [Ms. 3 Div. 945, February 23, 1990] __So.2d__ (Ala. Cr. App. 1990). In *Warner*, Judge Bowen, writing for the Court, stated:

> "A prosecutor may not use peremptory jury strikes in a racially discriminatory manner. *Batson*, supra. The principles of *Batson*, as interpreted by the Alabama Supreme Court, are set out in *Ex parte Branch*, 526 So.2d 609 (Ala. 1987), and *Harrell v. State*, [Ms. 88–1226, November 9, 1989] 555 So.2d 263, 265 (Ala. 1989) ('We take this opportunity to clarify the *Batson* analysis.'). Applying those principles to the facts of this case, we find that the tenets of *Batson* and *Branch* have been minimally satisfied.
>
> "In *Harrell v. State*, 555 So.2d at 268, n. 1, the Alabama Supreme Court noted:
>
> > "'"There are many possible reasonable explanations for such strikes [of blacks by the prosecution]. *Batson* demands that such strikes be related to the case to be tried and not be related to the defendant's and the jurors' shared race. *Batson*, 476 U.S. 79, 97–98 (1986). In a given case, the following factors may be relevant and may suffice to defeat the defendant's prima facie case:
> >
> > > "'"1. Age, fringe religious beliefs, body english, handwriting, and name association in certain instances. *Tolbert v. State*, 315 Md. 13, 553 A.2d 228 (1989); *Chambers v. State*, 724 S.W.2d 440 (Tex.Ct.App. 1987).

"'2. Demeanor of the juror. *United States v. Forbes*, 816 F.2d 1010 (5th Cir. 1987).

"'3. Fact that prospective juror, like defendant, may be young, single, and unemployed; fact that prospective juror was struck because divorced and of low income occupation, in favor of a professional, married person; avoidance of eye contact with prosecutor. *United States v. Cartlidge*, 808 F.2d 1064, 1070–71 (5th Cir. 1987).

"'From a consideration of these factors it is clear that the explanation need not rise to the level of a challenge for cause. *Batson*, 476 U.S. at 97. However, a clear, reasonable explanation for the strike must be given. *Ex parte Branch*, 526 So.2d 609, 623–24 (Ala. 1987).'"

"In *Grandison*, 885 F.2d at 147, it was observed: 'Although the presence of minorities on the jury does not mean that a *Batson* prima facie case cannot be made,... the fact that the jury included two black jurors is significant.' We find other observations of the court in *Grandison* applicable here.

"'No per se rule exists to establish a prima facie case of purposeful discrimination. [*United States v.] Lane*, 866 F.2d [103], 107 [(4th Cir. 1989)]; *United States v. Sangineto–Miranda*, 859 F.2d 1501, 1521 (6th Cir. 1988); *United States*

v. Montgomery, 819 F.2d 847, 851 (8th Cir. 1987); [*United States v.] Clemons*, 843 F.2d[741], 746 [(3d Cir. 1988)]. *But see United States v. Chalan*, 812 F.2d 1302, 1314 (10th Cir. 1987). Nor does a prosecutorial checklist exist to avoid the inference of discriminatory practices. "The Supreme Court's mandate in *Batson* to consider all the facts and circumstances means that we cannot lay down clear rules as to [what] ... will constitute or refute a prima facie case." *Sangineto–Miranda*, 859 F.2d at 1521.

"'....

"'A prima facie case of discrimination does not arise "every time a prosecutor strikes a black prospective juror." *Lane*, 866 F.2d at 105. Numerous valid factors may influence a prosecutor to strike a particular potential juror, including "current and past employment, general appearance and demeanor, previous jury service, and the absence or presence of apparent prejudice." *Id.* at 106. While prosecutors may not challenge prospective jurors because of their race, they may exercise their peremptory challenges "'for any reason at all, as long as that reason is related to [their] view concerning the outcome' of the case to be tried." *Batson*, 476 U.S. at 89, 106 S.Ct. at 1719, *quoting United States v. Robinson*, 421 F.Supp. 467, 473 (D.Conn. 1976), *mandamus granted sub. nom. United States v. Newman*, 549 F.2d 240 (2d Cir. 1977). Peremptory challenges have long been exercised to ensure both parties the existence of a fair and impartial jury; the usefulness of this device could be undermined by restrictive appellate rule–making.

Id at 147, 149."

__So.2d at __.

Just as in *Warner*, we find that the tenets of *Batson* and *Branch* have been minimally satisfied.

The fact that a prospective juror has reservations about imposition of the death penalty may constitute a race–neutral reason for the exercise of a peremptory strike. *Warner*, *supra*; *Smith v. State*, 531 So.2d 1245, 1247–48 (Ala. Cr. App. 1987); *Levert v. State*, 512 So.2d 790, 795–96 (Ala. Cr. App. 1987). Thus, the prosecutor's use of peremptory challenges to remove Mr. Mickens and Ms. Ball (numbers 1 and 2) from appellant's jury were entirely proper.

Connection with or founded suspicion of criminal activity can also constitute a sufficiently race–neutral reason for the exercise of a peremptory challenge. *Warner*, *supra*; *Power v. State*, 548 So.2d 590, 592–93 (Ala. Cr. App. 1988), *aff'd on other grounds*, 548 So.2d 605 (Ala. 1989); *Lynn v. State*, 543 So.2d 704, 709 (Ala. Cr. App. 1987), *aff'd*, 543 So.2d 709 (Ala. 1988) *cert. denied*, __ U.S. __, 110 S.Ct. 351, 107 L.Ed.2d 338 (1989); *Ward v. State*, 539 So.2d 407, 408 (Ala. Cr. App. 1988); *Avery v. State*, 545 So.2d 123, 126 (Ala. Cr. App. 1988); *Lewis v. State*, 535 So.2d 228, 232 (Ala. Cr. App. 1988); *Currin v. State*, 535 So.2d 221, 223 (Ala. Cr. App.), *cert. denied*, 535 So.2d 225 (Ala. 1988). This connection with or suspicion of criminal activity includes not only the juror in question, but also relatives and close friends of the juror. *United States v. Forbes*, 816 F.2d 1006, 1010 (5th Cir. 1987); *Scales v. State*, 539 So.2d 1074, 1074–75 (Ala. 1988); *Lynn v. State*, *supra*, 543 So.2d at 709; *Avery v. State*, *supra*, 545 So.2d at

136; *Ward v. State*, *supra*, 539 So.2d at 408; *Lewis v. State*, *supra*, 535 So.2d at 232. Thus, the prosecutor's use of peremptory challenges to remove Mr. Ball, Mr. Patton, Ms. Holifield, Ms. C. Harris, Ms. Spence, Ms. Cottrell, Ms. Lewis, Ms. B. Wilson, and Ms. S. Harris (numbers 3, 4, 6–8, 10, 12, 15, and 21) from appellant's jury was also proper.

Likewise, the fact that child support proceedings have been brought against a juror or someone closely connected with that juror has been held to be a race–neutral reason for the exercise of a peremptory challenge. *Warner v. State*, *supra*, __ So.2d at __; *Lynn v. State*, *supra*, 543 So.2d at 709; *Currin v. State*, *supra*, 535 So.2d at 223. Thus, the prosecutor's removal of Ms. Hood (number 5) from the jury ws proper based on this ground.

A hostile attitude toward law enforcement or dissatisfaction with the police has also been upheld as a sufficiently race–neutral explanation for the use of a peremptory challenge. *Warner v. State*, *supra*, __ So.2d at __; *Powell v. State*, *supra*, 548 So.2d at 593. Thus, the prosecutor's removal of Ms. Brown (number 18) was proper.

The fact that a prospective juror, like a defendant, is young, single, and unemployed is also a sufficiently race–neutral reason for the exercise of peremptory challenges, since such jurors may identify with the defendant. Young, single, and unemployed jurors may also be struck in favor of professional, married persons. *Harrell v. State*, 555 So.2d 263, 268 n. 1 (Ala. 1989); *Harris v. State*, *supra*, 545 So.2d at 147; *Currin v. State*, *supra*, 535 So.2d at 223. Thus, the prosecutor's removal of Ms. C. Harris and Ms. A. Harris (numbers 7 and 16) was proper. We would also note that Ms. C. Harris was

also properly removed because of the fact that her brother was a defendant in a criminal prosecution as discussed above.

Likewise, the demeanor of a juror can also provide a sufficiently race–neutral explanation for a prosecutor's use of a peremptory challenge. *Harrell v. State*, *supra*, 555 So.2d at 268 n. 1; *Warner v. State*, *supra*, __ So.2d at __. *See also United States v. Forbes*, *supra*, 816 F.2d at 1010. Demeanor, the way in which a person behaves or conducts himself, can include a number of characteristics, such as the desire not to serve as a juror, disinterest in the proceedings as a whole, inattentiveness exhibited by talking with others during voir dire, perceived hostility in answering prosecution questions, perceived favoritism toward the accused, or simply a general lack of respect for the proceedings which could be exhibited by such behavior as chewing gum, wearing sunglasses, hats, excessive jewelry, or inappropriate clothing while inside the courtroom. *See Harrell v. State*, 555 So.2d at 268 n. 1; *Harris v. State*, *supra*, 545 So.2d at 147; *Currin v. State*; *supra*, 535 So.2d at 223. *See also Lockett v. State*, 517 So.2d 1346 (Miss. 1987) *cert. denied*, 487 U.S. 1210, 108 S.Ct. 2858, 101 L.Ed.2d 895 (1988) (wearing of hat, hostility toward prosecution, desire not to serve because of invalid parent); *Taitano v. Commonwealth*, 4 Va.App. 342, 358 S.E.2d 590 (1987) (age, dress, demeanor); *Chambers v. State*, 724 S.W.2d 440 (Tex.Ct.App. 1987) (age, body english); *Townsend v. State*, 730 S.W.2d 24 (Tex.Ct.App. 1987) (inattentiveness); *Smith v. State*, 734 S.W.2d 694 (Tex.C.App. 1987) (excessive jewelry). Thus, the prosecutor's removal of Ms. Johnson, Mr. Pratcher, Mr. K. Williams, Ms. Hayes, and Ms. Hobson (numbers 9, 11, 17, 19, and 20) was proper. We would note, however, that we have grave reservations concerning the prosecutor's desire to strike jurors Pratcher and Williams based on their proximity to another juror who had expressed his opposition to the death penalty.

The fact that a juror is overly familiar with the facts of a case has been held sufficiently race–neutral to satisfy a reviewing court. *See Harris v. State, supra*, 545 So.2d at 147. Thus, it was proper for the prosecutor to remove Ms. E. Williams (number 14) based on her familiarity with this case, particularly because of her knowledge that one of the victims made a dying declaration — an essential part of the defendant's case. It is only logical that a prosecutor would wish to strike a juror who had indicated that she would place a great deal of importance in a piece of evidence crucial to the theory of defense.

Finally, the fact that a prosecutor distrusts a juror or finds his responses not to be credible has also been held to be a sufficiently race–neutral reason for using a peremptory challenge. *Rodgers v. State*, 725 S.W.2d 477, 480 (Tex.Ct.App. 1987). As the prosecutor explained, he found the fact that Ms. Shelton (number 13), a resident of the community in which the crime had occurred, had absolutely no knowledge of the crime "extremely strange" in light of the fact that every other juror from that particular community had heard of the incident. We find this to be a sufficiently race–neutral reason. While members of the jury venire from other parts of Hale County might not have heard of this incident, we likewise find it extremely strange that a resident of such a small community would have absolutely no knowledge of an incident of this magnitude which occurred in her own back yard.

' "[T]he vagarious process of choosing jurors need not be controlled by a simple equation; it may be influenced by intuitive assumptions that are not fatally suspect merely because they are not quantifiable, *see [United States v.] Forbes*, 816 F.2d [1006] at 1010–11 [(5th Cir. 1987)], and by interplay of various factors, *see United States v. Lewis*, 837 F.2d 415, 417 n. 5 (9th Cir. 1988) [cert]. *denied*, __ U.S. __, 109 S.Ct. 304,

102 L.Ed.2d 323 (1988)]." *Warner v. State*, *supra*, __ So.2d at __, *quoting United States v. Lance*, 853 F.2d 1177, 1181 (5th Cir. 1988). While this Court has concern about several of the reasons articulated by the prosecutor for the exercise of his peremptory jury challenges, we find that, as a whole, the prosecutor provided sufficiently race–neutral reasons for the exercise of those challenges.

> " 'In reviewing the trial court's finding that the strikes were nondiscriminatory, we can only reverse if we find that that determination was clearly erroneous.' *Williams*, 548 So.2d at 504. Accord, *Ex parte Branch*, 526 So.2d at 624. ' "In a *Batson* context, the Supreme Court observed that because the trial judge's findings 'largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference.' *Batson*, 476 U.S. at 98, n. 21." ' *Owens v. State*, 531 So.2d 22, 23 (Ala.Cr.App. 1988), quoting *State v. Antwine*, 743 S.W.2d 51, 66 (Mo. 1987), cert. denied, __ U.S. __, 108 S.Ct. 1755, 100 L.Ed.2d 217 (1988). 'In reviewing the lower court's ruling, we have been mindful that it is not our function to decide this issue *de novo*, to "duplicate the role of the lower court." ' *Owens*, 531 So.2d at 24. The finding of the trial judge 'is entitled to considerable deference on appeal.' *Harrell*, __ So.2d at __. See also *Scales v. State*, 539 So.2d 1074, 1075 (Ala. 1988). ('[W]e are convinced that the trial judges in our system are in a much better position than appellate judges to decide whether the truth has been stated')."

Warner v. State, *supra*, __ So.2d at __. Just as in *Warner*, we find the trial court's ruling was not clearly erroneous. Accordingly, no reversal is warranted.

II

Appellant next contends that the trial court erred in denying his motion for mistrial based upon the prosecutor's comments during closing argument that defense counsel was attempting to hide evidence from the jury. We would first note that we have thoroughly examined the portion of the record that contains the closing arguments of counsel and we can find no instance—either during closing arguments or at the conclusion of said arguments— where defense counsel moved for a mistrial. Moreover, appellant's brief fails to specify exactly which portion of the prosecutor's argument was erroneous. Since, however, defense counsel objected to but one portion of the State's closing arguments, we will examine that portion of the State's closing argument.

At the close of the evidence, the prosecutor made his first closing argument, to which defense counsel made no objections. Defense counsel then made his closing argument, during which he attempted to poke holes in the State's case by raising questions concerning the credibility of the State's evidence and the failure of the State to present certain evidence. After defense counsel made his closing argument, the prosecutor made his final closing argument to the jury. He argued, in pertinent part, as follows:

> "The Defense attorney says, Oh, well, you know, all these policemen got there and they forced him to confess. Now wait a minute, folks, you read what the man said. He said over and over if they're going to force him to confess, if they're going to make it up, how about let's add a few more good facts that would make it nicer to read. He doesn't have him saying that it was somebody else's idea and somebody shot at me and I just shot back. Let's not say that. Let's don't say that

I went in there and shot the man because I'm a cold–blooded killer, well, obviously, he didn't put that in there because they took down what the man told him. You can't add and you can't take away. It's their job and they're trained that way. We come up here and every one of these cases over and over and over again, and what we get tried is that they tried to try the policemen. They said he did everything wrong. They also try to throw smoke at you and cover up all the evidence and point you off in some direction out yonder. They don't think you've got sense enough to hear what is going on up here.

"MR. MORRIS: I object. The jury has got fine sense. I resent that the District Attorney is making any reference to the fact that I don't think the jury has got good sense.

"MR. GREENE: I've got every right to comment on the evidence.

"THE COURT: This is argument of counsel. Continue.

"MR. GREENE: Mr. Morris stood up here in the course of this trial and threw smoke at you every way he could. Now why is he doing that? Well, obviously any report about anybody with a shot hand anywhere around here was going to be looked into. That's clear as a bell. But you're supposed to think that it's somebody else. Now what does the evidence connect to? It connects to Stephens."

When determining whether a prosecutor's statement requires reversal

> "...'it must be examined in its context and in light of what had transpired, that is, in light of preceding argument of defense counsel, to which the prosecutor's argument was an answer.' *Washington v. State*, 259 Ala. 104, 65 So.2d 704 (1953); *Gibson v. State*, 347 So.2d 576 (Ala. Crim. App. 1977); *Rutledge v. State*, [Ms. 5 Div. 610, August 16, 1983] (Ala. Crim. App. 1983). The rule in Alabama is that 'remarks or comments of the prosecuting attorney, including those which might otherwise be improper, are not grounds for reversal when they are invited, provoked, or occasioned by accused's counsel and are in reply to or retaliation for his acts and statements.' *Shewbart v. State*, 33 Ala. App. 195, 32 So.2d 241, cert. denied, 249 Ala. 572, 32 So.2d 244 (1947); *Camper v. State*, 384 So.2d 637 (Ala. Cr. App. (1980); *Wilder v. State*, 401 So.2d 167 (Ala. 1981), cert. denied, 454 U.S. 1057, 102 S.Ct. 606, 70 L.Ed.2d 595 (1981); *Miller v. State*, 431 So.2d 586 (Ala. Crim. App. 1983); *Rutledge*, supra."

Henderson v. State, 460 So.2d 331, 333 (Ala. Cr. App. 1984). *See also United States v. Robinson*, 485 U.S. 25, 108 S.Ct. 864, 99 L.Ed.2d 23 (1988); *Cason v. State*, 515 So.2d 721, (Ala. Cr. App.), *cert. denied*, 515 So.2d 725 (Ala. 1987).

In *Dossey v. State*, 489 So.2d 662, 665 (Ala. Cr. App. 1986), Judge Bowen, writing for this court, stated as follows:

"The prosecutor has a right to comment on and answer statements made by defense counsel in argument to the jury. *Dollar v. State*, 26 Ala. App. 361, 159 So. 704 (1935); *Moragne v. State*, 16 Ala. App. 26, 28, 74 So. 862, 864; reversed on other grounds, 200 Ala. 689, 77 So. 322 (1917). Counsel should be afforded wide latitude in responding to assertions made by opposing counsel in previous argument. *York v. State*, 34 Ala.App. 188, 190, 39 So.2d 694, 696 (1948), cert. denied, 252 Ala. 158, 39 So.2d 697 (1949). 'Wide latitude is given the solicitor in making reply to argument previously made by appellant's counsel.' *Moody's v. State*, 40 Ala. App. 373, 374, 113 So.2d 787, 788 1959). '[W]ide latitude is given a district attorney in making reply in kind,... and the propriety of argument of counsel is largely within the trial court's discretion.' *Jettson v. State*, 435 So.2d 167, 171 (Ala. Cr. App. 1983)."

Our examination of the record convinces this Court that the prosecutor was merely replying in kind to arguments made by defense counsel. During his argument to the jury, defense counsel made many disparaging references to the strength of the State's case. He attacked the State's evidence, particularly the failure by State experts to be able to positively identify whether the type B bloodstains found at the scene of the crime could have come from only the appellant and no other person. Defense counsel also questioned the State's failure to introduce certain evidence, namely a hat and gloves recovered during the course of the investigation. He pointed out to the jury the inability of ballistics experts to positively identify the shotgun pellets removed from appellant's hand as having come from the victim's shotgun. Defense counsel further pointed out that appellant's fingerprints were never found at the scene of the crime, not even on the .25 caliber automatic pistol that he admitted owning. Following these statements, defense counsel then told the jury that "I want the man [referring to the

prosecutor] who's got the last shot to tell you about this too." Defense counsel's statement was a clear invitation to the prosecutor to reply to his statements, which he did. As seen above, the essence of the State's final closing argument was that defense counsel was trying to throw the jury off by pointing them in other directions than at his client. The prosecutor merely responded to defense counsel's previous argument. Accordingly, his comments do not warrant reversal.

"Moreover, statements of counsel in argument to the jury must be viewed as having been made in the heat of the debate, and such statements are usually valued by the jury at their true worth." *Harris v. State*, 539 So.2d 1117, 1123 (Ala. Cr. App. 1988). *See also Orr v. State*, 462 So.2d 1013, 1016 (Ala. Cr. App. 1984); *Sanders v. State*, 426 So.2d 497, 509 (Ala. Cr. App. 1982). The prosecutor admitted as much when he informed the jury that statements made by counsel in closing arguments were not evidence and that sometimes personalities were interjected into the argument, but indicated that this was merely the attorneys doing their job to represent their side of the case the best way they knew how. As we have previously stated,

> "Control of closing argument rests in the broad discretion of the trial judge and, where no abuse of discretion is found, there is no error. *Thomas v. State*, 440 So.2d 1216 (Ala. Crim. App. 1983); *Robinson v. State*, 439 So.2d 1328 (Ala. Crim. App. 1983); *Elston v. State*, 56 Ala. App. 299, 321 So.2d 264 (1975). The trial judge can best determine when discussion by counsel is legitimate and when it degenerates into abuse. *Hurst v. State*, 397 So.2d 203 (Ala. Crim. App.), cert. denied, 397 So.2d 208 (Ala. 1981); *Garrett v. State*, 268 Ala. 299, 105 So.2d 541 (1958)."

Sasser v. State, 494 So.2d 857, 860 (Ala. Cr. App. 1986). As can been seen from an examination of the record, the trial judge maintained close control of closing arguments by both attorneys, and, on several occasions when argument became heated, warned counsel not to overstep their bounds, then instructed the jury that what was said in argument was not to be considered as evidence. We find no abuse of discretion by the trial court. Accordingly, this issue does not warrant reversal.

III

Appellant also contends that the prosecutor was guilty of prosecutorial misconduct when he tried to impeach him for a crime for which he had not been convicted. In the sentence phase of appellant's trial, during cross–examination of the appellant the following occurred:

"Q I see. You know a Mr. Saxon?

"A Yes.

"Q Do you have anything to do with a robbery of his place of business there in Carrollton, Georgia?

"A No, sir.

"Q You deny that?

"A Yes, sir. Because Mr. Saxon knows me personally.

"MR. MORRIS: Judge, could we speak to you?

(Whereupon the following proceedings were held in the presence of, but out of the hearing of the jury:)

"MR. MORRIS: The Defendant moves for a mistrial in this proceeding. He asked him about a specific offense that he has not been convicted of. He's not been arrested in that and he denies it. The Defendant moves for a mistrial.

"MR. GREENE: Your Honor, the Defendant has entered a defense trying to show repentence of a life of crime and he's committed all these offenses. He's been asked about all these offenses. Now he brought it up, we didn't. That's why I did it. I think I'm justified in asking this question.

"MR. MORRIS: Judge, he made the statement — well, I renew my motion and insist on my motion. The law is specific about that, Judge.

"THE COURT: He asked him if he denied it.

"MR. MORRIS: He can't ask that. Now I didn't bring up anything about Mr. Saxon and he knows that.

"THE COURT: I know that. I'll deny the motion at this time.

"MR. MORRIS: I do object.

"THE COURT: I understand."

Generally, the fact that the accused, or any witness, has been investigated, arrested, charged, or indicted is inadmissible to impeach such witness, unless he was subsequently convicted of that offense. *Smitherman v. State*, 521 So.2d 1050, 1059 (Ala. Cr. App. 1987), *cert. denied*, 521 So.2d 1062 (Ala. 1988). In the instant case, however, the prosecutor's question came during the sentence phase of his bifurcated trial. This is an important distinction because of the provisions of § 13A–5–45(c) and (d), which provide in pertinent part as follows:

> "(c) At the sentence hearing evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to the aggravating and mitigating circumstances referred to in sections 13A–5–49, 13A–5–51, and 13A–5–52....
>
> "(d) Any evidence which has probative value and is relevant to sentence shall be received at the sentence hearing regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements...."

Thus, it is clear that the usual strict rules of evidence are not applicable to sentencing hearings.

Here, appellant testified in great detail at his sentencing hearing in an attempt to establish a mitigating circumstance—specifically, remorse and repentence for his previous life of crime. In order to counter appellant's testimony and to establish the aggravating factor of an extensive criminal history, it was incumbent upon the prosecutor to cross–examine appellant about his prior criminal activities. Thus, it was both relevant and probative for the prosecutor to question appellant about the specifics of his extensive criminal history. Appellant was given ample and fair opportunity to rebut the prosecution's evidence concerning his prior criminal history, and, in fact, admitted to having been convicted of all but the above complained–of incident. By denying this incident, appellant, in effect, did rebut it.

Moreover, since the harmless error applies to capital sentencing hearings, *Ex parte Whisenhant*, 482 So.2d 1241, 1244 (Ala. 1983), no reversal should be had when no undue prejudice resulted to appellant by this inquiry. While we recognize that this rule is to be applied with extreme caution in capital cases, *Ex parte Whisenhant*, 482 So.2d 1247, 1249 (Ala. 1984), we nevertheless find that the instant case is one in which this rule should be applied. First, if appellant were trying to establish a mitigating circumstances based on his remorse and repentance for his life of crime, then his negative answer did not injure that effort. That effort was not dependent upon his showing of a history of crime, but rather, upon his "acquiring religion," remaining drug–free, writing a book warning others about the dangers of drug–abuse, and generally demonstrating good behavior since his imprisonment. Second, being questioned about this incident did not harm him in the sense that absent this incident the State would have failed to establish the aggravating circumstance of appellant's extensive criminal history. In light of the fact that appellant had already admitted to two armed robberies, three burglaries, and a theft, we fail to see that this last inquiry had

any unduly prejudicial impact on the members of the jury given what they had already heard. Had this been a situation where appellant had no prior criminal history, then the State's asking the above complained–of question would most likely have been prejudicial to the appellant. As that is not the case here, the prosecutor's question resulted in no undue prejudice to the appellant. Therefore, no reversal is warrant for his behavior.

IV

The appellant next contends that the evidence adduced at trial was insufficient to support his convictions for capital murder. Specifically, Stephens contends that the State failed to present any direct evidence which linked him to the murders of James R. Bailey and Adam Pickens.

We first note that the mere fact that evidence is of a circumstantial nature does not make it deficient; circumstantial evidence is entitled to the same weight as direct evidence, provided it points to the guilt of the accused. *Linzy v. State*, 455 So.2d 260, 262 (Ala. Cr. App. 1984). The test of the sufficiency of circumstantial evidence is not whether the possibility exists that someone other than the accused committed the crime, but rather whether the evidence excluded every reasonable hypothesis but that of the accused's guilt. *Cumbo v. State*, 368 So.2d 871, 874 (Ala. Cr. App. 1978), *cert. denied*, 368 So.2d 877 (Ala. 1979). Viewing the State's evidence presented to the jury, which is set out above, under the principles enunciated in *Cumbo, supra*, we find that when viewed in the light most favorable to the prosecution, it was sufficient to allow the jury to reasonably find that the evidence excluded every reasonable hypothesis except that of appellant's guilt. The State's evidence established the following: On the afternoon of January 20, 1986, Mr. James R. Bailey and Mr. Adam Pickens were robbed, shot, and left for dead in Bailey's Store in rural Hale

County. They were last seen alive around 4:30 that afternoon. Sylvester Jackson discovered the crime when he went to the store to buy gasoline for his car around 4:45 p.m. At roughly the same time, Ms. Carrie Ingram and Ms. Sheila Kennedy observed a small black pickup truck proceeding rapidly down the road going away from Bailey's store. They saw two people in the truck. Ms. Kennedy believed the passenger was black, but could not be certain since he was slumped down in the seat. Ms. Linda Johnson and her son Kevin also observed the pickup truck in the vicinity of Bailey's store between 4:30 and 5:00 that afternoon. Kevin was able to identify the truck as a black Nissan pickup truck, and he had observed two black males inside the truck. Investigators recovered a .20 gauge shotgun, a .25 caliber automatic handgun, and several bullets and shotgun pellets at the scene of the robbery–homicide. Samples of bloodstains—later determined to be type B blood—at the scene where also taken. From the location of some of the blood stains, investigators determined that Mr. Bailey had very likely shot one of the robbers in the hand with his shotgun. Based on this information, Hale County authorities issued a "be on the lookout" for two armed males, one possibly injured. The following day, Georgia officials discovered the appellant, who had type B blood, in a local hospital being treated for a shotgun blast to his hand. A black Nissan pickup truck registered to the family of Christopher Starks was taken into custody and searched that same day. Among the items recovered were a box of .22 caliber Federal ammunition, a box of Remington ammunition, a box of .25 caliber Federal ammunition, and two wigs. Also found in the truck's floorboard and on the right front seat were some bloody rags, a holster for a .25 caliber pistol, cotton gloves, blood on the seat, and two weapons— a .32 and a .22 caliber revolver—in a Hardee's sack. The glove compartment contained some food stamps—later determined to have been issued in Alabama, specifically Hale and Tuscaloosa counties— and several pieces of identification of the appellant Victor R. Stephens. Subsequent scientific testing revealed that the

bullets recovered at the scene of the crime and from the two victims were fired from the .32 caliber revolver recovered from the black Nissan truck and the .25 claiber automatic pistol recovered at the scene. The bloodstains found in the truck were determined to be from type B blood. Additionally, appellant made three separate statements to authorities, in which he admitted his participation in the robbery–homicides at Bailey's store. Clearly, the evidence was inconsistent with any reasonable theory of innocence. Indeed, all material circumstances in the evidence point to the defendant's guilt. Thus, we find that the evidence presented at trial was sufficient to sustain the appellant's convictions.

V

As required by *Beck v. State*, 396 So.2d 645 (Ala. 1980), and § 13A–5–53, *Code of Alabama* 1975, we have reviewed this case for any error involving appellant's conviction and the propriety of his death sentence.

The appellant, Victor R. Stephens, was indicted and convicted for violating § 13A–5–40(a)(2), *Code of Alabama* 1975, an offense which is punishable by death.

There is no suggestion in the record that the death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, and there is no evidence to support any such contention.

Our review of the sentence proceedings reveals that the trial court's findings concerning the aggravating and mitigating circumstances are supported by the evidence. The trial court found the existence of two aggravating circumstances: first, that the capital offense was committed while the defendant was engaged in the commission of a robbery, § 13A–5–49(4), *Code*

of Alabama 1975; and second, that the defendant had been previously convicted of a felony involving the use or threat of violence to the person, § 13A–5–49(2), *Code of Alabama* 1975. After considering each of the statutory mitigating circumstances set out in § 13A–5–51, *Code of Alabama* 1975, and the possibility of any non–statutory mitigating circumstances as allowed by § 13A–5–52, *Code of Alabama* 1975, the trial court found the existence of no statutory mitigating circumstances. The trial court did, however, find that the defendant's recognition of his drug abuse as the cause for his behavior and his actions in writing a book that would warn teenagers of the pitfalls of using drugs to be a non–statutory mitigating circumstance to be considered in sentencing the defendant.

Our independent weighing of the aggravating and mitigating circumstances convinces this court of the proprietary of the death sentence in this case.

Moreover, we are convinced that the death sentence is neither excessive nor disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Indeed, fully two–thirds of Alabama death sentences have been imposed on defendants convicted of capital murder arising out of robbery–homicides. *Beck v. State*, *supra*, 396 So.2d at 654 n. 5. *See also, e.g., Hinton v. State*, 548 So.2d 547 (Ala. Cr. App. 1988), *aff'd*, 548 So.2d 562 (Ala. 1989), *cert. denied*, __U.S.__, 110 S.Ct. 419, 107 L.Ed.2d 383 (1990); *Bell v. State*, 475 So.2d 601 (Ala. Cr. App. 1984), *aff'd*, 475 So.2d 609 (Ala.), *cert. denied*, 474 U.S. 1038, 106 S.Ct. 607, 88 L.Ed.2d 585 (1985); *Jones v. State*, 456 So.2d 366 (Ala. Cr. App. 1983), *aff'd*, 456 So.2d 380 (Ala. 1984), *cert. denied*, 470 U.S. 1062, 105 S.Ct. 1179, 84 L.Ed.2d 838 (1985).

VI

Appellant's final contention is that death by electrocution as applied by the State of Alabama constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. This argument has previously been rejected. In addressing this issue, this Court, per Judge Patterson, held in *Jackson v. State*, 516 So.2d 726, 737 (Ala. Cr. App. 1985), *remanded on other grounds*, 516 So.2d 769 (Ala. 1986), that

> "The United States Supreme Court addressed the death by electrocution issue in *In re Kemmler*, 136 U.S. 436, 10 S.Ct. 930, 34 L.Ed. 519 (1890). In determining what constitutes cruel and unusual punishments, the Court stated: 'Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the constitution. It implies there is something inhuman and barbarous, — something more than the mere extinguishment of life.' *Id.* at 447, 10 S.Ct. at 933. In holding that such a punishment is not cruel or unusual, the Court reasoned 'that this act was passed in the effort to devise a more humane method of reaching the result.' *Id.* Accord *Spinkellink v. Wainwright*, 578 F.2d 582, 616 (5th Cir. 1978). Appellant's contention is therefore without merit; death by electrocution does not amount to cruel and unusual punishment per se, but is a constitutional means of imposing a sentence of death."

See also Wright v. State, 494 So.2d 726, 741 (Ala. Cr. App. 1985), *aff'd*, 494 So.2d 745 (Ala. 1986), *cert. denied*, 479 U.S.

1101, 107 S.Ct. 1331, 94 L.Ed.2d 183 (1987). The appellant has presented no evidence that this state's method of execution involves torture, and thus, no reason exists for this Court to overrule its previous holdings on this issue.

VII

Finally, we have searched the entire record for any plain error or defect which might have adversely affected the appellant's substantial rights and have found none. Rule 45A, A.R.App.P.

The appellant received a fair and impartial trial. Therefore, his convictions for these capital offenses and his sentence of death are due to be, and they are hereby, affirmed.

AFFIRMED.

All the Judges concur.

APPENDIX C

STATE OF ALABAMA	*	IN THE CIRCUIT COURT OF
VS.	*	HALE COUNTY, ALABAMA
VICTOR R. STEPHENS	*	CASE NO. CC–86–34

SENTENCING ORDER

The Defendant was charged by a two count indictment with the murder of Adam Pickens and James R. Bailey during the commission of a Robbery in the First Degree, both being capital offenses. A jury returned a verdict on December 17, 1987 finding the Defendant guilty of both counts of the Capital Offense, whereupon, the court adjudged the Defendant guilty in accordance with the jury's verdict.

Following the adjudication of guilt, a separate sentence hearing was conducted before the same jury, and the jury returned a recommendation that the Defendant be sentenced to life imprisonment without parole.

The Court has ordered and received a written pre–sentence investigation report and has conducted an additional sentence hearing pursuant to Section 13A–5–47 of the Code of Alabama, 1975. At the sentence hearing, the State, through its District Attorney, urged that the Court fix the Defendant's punishment at death. The Defendant, through his counsel,

argued that the court should fix his punishment, in accordance with the jury's recommendation at life imprisonment without parole.

FINDINGS OF FACTS SUMMARIZING THE CRIME AND THE DEFENDANT'S PARTICIPATION IN IT

The bodies of James R. Bailey and Adam "Pop" Pickens were discovered at Bailey's Grocery Store on Alabama Highway 14 in the Wedgeworth Community of Hale County, Alabama on January 20, 1986. Mr. Bailey, age 72, the owner of the store, was found dead inside the store apparently of multiple gunshot wounds. Adams Pickens, age 82, was discovered alive inside the store suffering from multiple gunshot wounds. Mr. Pickens was transported by ambulance to Druid City Regional Medical Hospital in Tuscaloosa, Alabama wherein he died shortly after admittance to the medical facility.

On Monday, January 20, 1986, a customer, Sylvester Jackson, came to the store at approximately 4:45 p.m. in order to purchase gasoline for his vehicle. After pumping the gas, Mr. Jackson entered the store and observed both victims on the floor. Mr. Jackson promptly left, told his mother of the incident, and asked that the Sheriff be notified. Hale County Sheriff, H.C. Colvin, Alabama Bureau of Investigation Investigator, C.W. Gibson; and Forensic Science Crime Scene Examiner, John McDuffie arrived at the store to begin their investigation and collection of evidence.

At trial, Carrie Ingram and Sheila Kennedy stated that in the late afternoon of January 20, 1986, they were walking in Akron, Alabama on Alabama Highway 60 in the oncoming traffic lane wherein they were met by a small black pickup truck

traveling at a high rate of speed. The witnesses testified that the passenger of the vehicle was black and that the truck was proceeding in a direction away from the Bailey's Store. Testimony established that the witnesses' location was approximately six miles from the Bailey Store.

Kevin Johnson testified that he was riding with his mother in Akron and also observed a small black truck proceeding at a high rate of speed. Kevin, age 14, testified that he observed two black males in the pickup and that he was certain that the vehicle was a Nissan as he observed the lettering "NISSAN" on the back of the truck.

The examination of the store revealed that Mr. Bailey was robbed of money and food stamps and that Mr. Bailey had fired his .20 gauge shotgun at the intruders. Adam Pickens was unarmed. Mr. Bailey was found dead in the middle of the store still clutching his shotgun. Mr. Bailey had apparently been shot in a different location inside the store as there was a trail of blood leading to Bailey's body. Further examinations of the scene revealed that one individual, later determined to be the Defendant, Victor R. Stephens, had been hit by the shotgun as blood was found near the front door together with a .25 caliber automatic pistol. A No. 8 shotgun pellet was removed from the barrel of the weapon.

Pursuant to the information received from witnesses and the evidence collected at the scene, Hale County Sheriff's Department issued a regional teletype advising law enforcement agencies to "Be On The Lookout" for two males armed, one possibly injured. A request was made of these agencies to check area clinics and hospitals for persons with possible gunshot wounds. On Tuesday, January 21, 1986, Georgia Bureau of Investigation Agent Charles Stone and ABI Agent Ed Traylor advised the Hale County Sheriff's Department that both subjects were in custody in Carroll County, Georgia. Further

information from Georgia officials revealed that Christopher L. Starks was apprehended in possession of a .32 caliber pistol and that Victor R. Stephens was treated for a shotgun wound in his left hand at the Bowdon Area Hospital in Carroll County, Georgia on Monday evening.

Autopsies were performed on both victims and the results revealed that James R. Bailey had died as a result of multiple gunshot wounds to the face, chest, abdomen, and hand. Both expended .32 caliber and .25 caliber bullets were removed from Mr. Bailey's body. Adam Picken's autopsy revealed that he died from four separate gunshot wounds to the back. Analysis revealed that all four expended bullets recovered from Picken's body were .25 caliber.

On Wednesday, January 22, 1986, a black Nissan pickup truck owned by Christopher L. Starks, a co–defendant, was searched by law enforcement agencies. Taken from the vehicle were blood stains from the passenger's seat together with three (3) one dollar food stamps issued from Hale County and Tuscaloosa County, Alabama. Also taken from the glove compartment of the truck were identification papers belonging to Victor R. Stephens.

A series of statements were taken by law enforcement officers from the Defendant, Victor R. Stephens, while he was in the custody of Georgia officials. These statements were taken orally on January 23, 25 and 28, 1986. The gist of the three statements revealed that Christopher Starks, also known as, "Peabody" and Victor Stephens left the State of Georgia on Saturday and traveled to New Orleans, Louisiana where they remained until Monday. On Monday, with Starks driving, the two went to a store in Alabama occupied by a white male (later identified as James R. Bailey) and a black male (later identified as Adam Pickens). Stephens stated throughout these statements that it was Starks's idea to commit the robbery.

Stephens further stated that after entrance to the store by "Peabody", the white man fired his shotgun at Stephens striking him in the left hand. It was at this time that Stephens "emptied" his .25 caliber pistol. According to Stephens, Starks was armed with either a .22 or .32 caliber pistol. Stephens admitted leaving the .25 caliber automatic pistol at the store.

During the trial, Forensic Serologist, Larry Huys, testified that he received blood samples from both victims Bailey and Pickens and determined that each had ABO type "O" blood. Receipt of Defendant Stephen's blood revealed his blood to be ABO type "B". Examination of blood from the passenger seat of Stark's 1986 Black Nissan pickup together with blood removed from the door facing and concrete of the Bailey Store revealed that all three items were of blood type "B", consistent with Defendant Victor R. Stephen's blood type.

Seven expended bullets were removed from the victims (three from Bailey, four from Pickens) and examined by Forensic Firearm Examiner Lawden Yates. The analysis revealed that two .32 caliber bullets and one .25 caliber bullet were removed James R. Bailey and all four bullets removed from Adam Pickens were .25 caliber. Further examination positively identified all the .32 caliber bullets to have been fired from the same .32 caliber pistol found on the person of Christopher L. Starks at the time of his arrest. The five .25 caliber bullets were matched to the .25 caliber pistol that was left at the store and admittedly fired by Victor R. Stephens. Shotgun pellets removed from Stephen's hand were compared with shot pellets removed from the store and the barrel of the .25 caliber gun and the analysis revealed all to be No. 8 shotgun pellets, consistent with the type shell recovered from Bailey's weapon.

FINDINGS CONCERNING THE EXISTENCE OR NON-EXISTENCE OF AGGRAVATING CIRCUMSTANCES

In compliance with the requirements of law that the trial court shall enter specific findings concerning the existence or non-existence of each aggravating circumstance enumerated by statute (13A-5-47 of the Code of Alabama, 1975) the court finds that none of the aggravating circumstances enumerated by statute were proved beyond a reasonable doubt in the proceedings before this Court *except* the following which the Court finds were proved beyond a reasonable doubt:

1. *The capital offense was committed while the Defendant was engaged in or was an accomplice in the commission of, or an attempt to commit or flight after committing or attempting to commit robbery.*

The facts presented by the State at trial were overwhelming as to the existence of this aggravating circumstance and the verdict by the jury to these two separate counts of Capital Murder is fully supported by the evidence. It was clear that the Defendant left the interstate on his return trip from Louisiana for the purpose of committing the robbery. The location of the Bailey Store was miles from any incorporated community. The store was operated by Mr. Bailey and his friend of 40 years Adam Pickens.

The intent to kill these victims was as clear as glass. Bullets were removed from the cash register, next to the meat cooler, and from the bodies of James R. Bailey and Adam Pickens. It was obvious that Mr. Bailey was fired at as he stood behind the cash register and consistently as he moved behind the cooler to the middle of the room. Just as clear was the fact that

Adam Pickens was shot four times in the back as he sat on the stool of the store. It certainly may be argued that Adam Pickens never saw his killer.

Statements made by the Defendant that he only fired after [Bailey] fired at him with the shotgun are totally false and unworthy of belief. Forensic evidence revealed that a No. 8 shot pellet was removed from the barrel of the .25 caliber automatic pistol. The Defendant admitted "emptying" his weapon. Obviously the Defendant "emptied" his pistol *before* Mr. Bailey fired his single shot .20 gauge shotgun. These .25 caliber bullets were recovered in the cash register as well as from the bodies of *both* Bailey and Pickens. To suggest, as Defendant has, that he fired in self–defense is completely beyond comprehension.

2. *The Defendant was previously convicted of a felony involving the use or threat of violence to the person.*

In establishing this aggravating circumstance, the State of Alabama has introduced into evidence a certified copy from the Circuit Court of Randolph County, Alabama, reflecting convictions of the Defendant, Victor R. Stephens, on October 20, 1987 for Robbery 1st Degree and Attempted Murder. The Defendant, as a habitual offender, was sentenced to life imprisonment without parole for this offense. The Court draws particular note in that the January 9, 1986 Randolph County incident was remarkably similar in nature to the present case arising within weeks of the death of James R. Bailey and Adam Pickens.

The Defendant's previous actions noted in these prior convictions certainly begin to establish a pattern of ruthlessness, violence, and utter disregard for human life.

FINDINGS CONCERNING THE EXISTENCE OR NON-EXISTENCE OF MITIGATING CIRCUMSTANCES

I

In compliance with the statutory requirement that the trial court enter specific findings concerning the existence or non-existence of mitigating circumstances enumerated by statute, the Court finds that none of the following mitigating circumstances exist in this case:

1. *That the Defendant has no significant history of prior criminal activity.*

In the sentencing phase, the Defendant took the stand and testified to a significant history of criminal activity. Mr. Stephens admitted and the State has offered numerous prior convictions in addition to the Robbery First Degree and the Attempted Murder used by the State as an aggravating circumstance. These exhibits reflect an extensive history of property crimes which began when the Defendant was 18 years old. These exemplified copies include four burglary convictions and a theft by receiving stolen property all in Carroll County, Georgia in January, 1981. Mr. Stephens's criminal record is, simply put, atrocious. His degree of activity has increased from property crimes to the use of force to obtain one's property to the final stage of death in taking one's property. Not only has his conduct become violent but it has now expanded to three separate jurisdictions in two states.

2. *That the capital offense was committed while the Defendant was under the influence of extreme mental or emotional disturbance.*

After the Defendant's arraignment, counsel for Victor R. Stephens requested that the Defendant be committed to the Taylor Hardin Secure Medical Facility at Tuscaloosa, Alabama for evaluation and examination. Pursuant to Section 12–16–22 of the Code of Alabama, 1975, a Lunacy Commission was appointed to determine Stephen's competency to stand trial and his mental state at the time of the January 20, 1986 incident at the Bailey Store. Doctors Thompson, Nagi, and Bryant, all staff psychiatrists, examined the Defendant separately and their findings were as follows:

a. There was no evidence of any past or present severe disturbance in Mr. Stephen's thinking or emotions.

b. There appears to be a general history of alcohol and drug abuse and anti–social behavior.

c. At the present time, Mr. Stephens appears to be able to understand the nature and consequences of the charges against him, to participate rationally in court proceedings and to assist his attorney in his own defense.

d. There does not appear to be any evidence that Mr. Stephens was experiencing any psychiatric disorder at the time of the alleged offense.

e. There does not appear to be any evidence that Mr. Stephens was experiencing any psychiatric disorder at the time of the alleged offense that would have made him unable to understand the nature and consequences of his behavior or to control his behavior in conformity with law.

While the Court recognizes that this mitigating circumstance contemplates a disturbance of the mind which might exist separate and apart from a mental disease or defect, and that the report of the psychiatrists is, by no means, conclusive, the Court finds from the consideration of all the evidence including the Defendant's admitted drug usage, that the Defendant was not under the influence of extreme mental or emotional disturbance.

3. *That the victim was a participant in the Defendant's conduct or consented to it.*

There is no support for this mitigating circumstance. The testimony was clear that James R. Bailey and Adam Pickens were unknown to Victor R. Stephens and Christopher L. Starks. James R. Bailey and Adam Pickens were the owner and employee of the Bailey Store and the testimony revealed that they were performing their normal daily activities of running the business on the date of their death. To suggest that James R. Bailey or Adam Pickens were participants in the Defendant's conduct or consented to their deaths would be totally false and completely without merit.

4. *That the Defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor.*

The evidence was uncontroverted that the Defendant, Victor R. Stephens, was accompanied by Christopher L. Starks at that time of the robbery and deaths of the two victims. Certainly, Christopher L. Starks was a participant and his involvement was substantial due to the fact that the .32 caliber pistol found in his possession was identified as causing the death of James R. Bailey. However, to suggest that the Defendant, Victor R. Stephens was a mere accomplice in the capital offense and that his participation was minor could not be supported by the evidence. Victor R. Stephens by his own testimony has admitted firing his .25 caliber automatic pistol until he had "emptied" the weapon. The forensic evidence submitted at trial reflects that .25 caliber bullets were recovered from both the body of James R. Bailey and Adam Pickens.

The Court is also aware that the Defendant, Victor R. Stephens, has attempted to place the primary blame for the deaths of Bailey and Pickens on Christopher L. Starks. A consideration of all the evidence in the case revealed that Victor R. Stephens was a willing participant who planned the robbery, caused the deaths of *both* victims, and shared in the proceeds of the robbery.

5. *That the Defendant acted under extreme duress or under the substantial influence of another person.*

One of the Defendant's major contentions mentioned in his statements to law enforcement officers was that the idea of the robbery was Christopher L. Starks's. The evidence present at trial does reveal that Stephens was in the vehicle of

Christopher L. Starks when they were returning from Louisiana and the evidence also establishes that Christopher L. Starks drove the vehicle from the Bailey Store and back to Carroll County, Georgia. However, the evidence simply does not corroborate Stephens's contention of being under the substantial influence of Christopher L. Starks. The autopsies revealed that .25 caliber projectiles were recovered from both James R. Bailey and Adam Pickens. The Defendant by his own words admits to "emptying" his .25 caliber pistol at the store. What Victor R. Stephens fails to state in his interview with law enforcement officers is that he also fired at Adam Pickens. He attempts to suggest that the only reason the weapon was fired was in self–defense to James R. Bailey's shotgun. In retrospect, when all the evidence is considered the truth is simply not told by Victor R. Stephens. Victor R. Stephens did not know that a shot pellet from the Bailey's .20 gauge shotgun was recovered inside the barrel of Stephens's pistol.

The record as a whole revealed that the dominant party, if there was one, was Victor R. Stephens. The evidence certainly establishes that this robbery was a planned act by both individuals and that Victor R. Stephens was the "trigger man" causing the death of both victims in the January 20, 1986 robbery.

6. *That the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.*

The Defendant originally entered a plea of not guilty by reason of mental disease or defect. With regard to the insanity defense, there was no evidence presented to the jury during the guilt phase to show any possible basis for a charge of not guilty by reason of mental disease or defect. Because of this complete lack of evidence, this Court did not instruct the jury on the insanity defense. While the Court recognizes that this

mitigating circumstance contemplates impaired capacity which might exist separate and apart from the mental disease for defect, the Court finds, from a consideration of the Lunacy Commission report of the Taylor Hardin Secure Medical Facility and the testimony provided by the Defendant during the sentencing phase, that this mitigating circumstance does not exist.

7. *The Age of the Defendant at the time of the crime.*

Victor R. Stephens was 23 years of age at the time he committed the capital offense of which he is convicted. One might argue that a 23 year old was in the early years of his adult life and would not be as responsible for his actions as one older. However, one must look to the actions of Victor R. Stephens considering his age. At the age of 18, Victor R. Stephens adopted a life style of an adult. Six weeks after his 18th birthdate, Victor R. Stephens committed five separate felonies in the State of Georgia, and, subsequently was sentenced to the penitentiary for a period of six years. Apparently, the Defendant never attempted to rehabilitate himself from his early criminal activity as he committed two violent offenses of Robbery 1st Degree and Attempted Murder just 11 days prior to the January 20, 1986 offenses at the Bailey Store. The continued criminal activity in which the Defendant engaged was less akin to the behavior of a young adult, but more akin to the conduct of a seasoned criminal.

Additional consideration has been given by this Court as to any non–statutory mitigating circumstances presented by Victor R. Stephens at the sentencing hearings. Mrs. Stephens, mother of the Defendant, together with Mr. Stephens presented testimony as to why his life should be spared. They both addressed the Defendant's drug addiction and its involvement in all of his criminal activity. The Defendant has stated that since his imprisonment, he has begun writing a book that would warn teenagers of the pitfalls of drug usage. This is an admirable gesture by Mr. Stephens and worthy of considerations by this Court in mitigation.

CONCLUSION

The Court has carefully weighed the existence of the statutory aggravating circumstances and the *non*–existence of any of the statutory mitigating circumstances and has additionally considered both the non–statutory mitigating circumstances and the recommendation of the jury. While the non–statutory mitigating circumstances and the jury's recommendation of life imprisonment without parole have weighed heavily in the Court's consideration, it is the judgement of this Court that they are substantially outweighed by the aggravating circumstances and non–existence of statutory mitigating circumstances, it is therefore,

ORDERED, ADJUDGED, and DECREED that the Defendant shall be punished by death.

DONE and ORDERED, this 24th day of July, 1989.

Judge Charles A. Thigpen
Judge of the Circuit Court
Fourth Judicial Circuit